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No. 92-

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

William J. O'Brien
Petitioner

v.

Consolidated Rail Corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the preemptive effect of the Railway Labor Act to be judged by the same standard set forth in Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988), which addressed preemption under the Labor Management Relations Act, or by a different standard?

2. Are state law claims of handicap discrimination more vulnerable to federal labor act preemption than state law claims of discrimination on the basis of race, sex, age, etc?

3. When, if ever, may labor unions, through the collective bargaining process, prospectively waive the State statutory rights of their members to be free from discrimination based on handicaps, race, sex, age, or other protected categories?

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INTRODUCTION

William O'Brien, an individual who was born without a right hand, petitions for a writ of certiorari to review the judgment of the First Circuit Court of Apeals, which held that his state law handicap discrimination claim was entirely preempted by the Railway Labor Act.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals, which held that plaintiff's state law handicap discrimination claim was preempted by the Railway Labor Act, is reported at 972 F.2d 1 (1992). It is reproduced

in the appendix at pages A-1 to A-27. The Report and Recommendation of the United States magistrate are reported in the appendix at pages B-1 to B-39. The order and judgment of the United States District Court for the District of Massachusetts, which adopted the recommendation of the magistrate, are unreported, but are reproduced in the appendix at pages C-1 to C-3.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on August 5, 1992. Petitioner invokes the jurisdiction of the Court under 28 U.S.C. §1254 (1988 Ed.) The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291.

STATUTORY PROVISIONS INVOLVED

Mass. General Laws Chapter 151B, §4 provides in pertinent part:

> It shall be an unlawful practice:
> ...
> 16. For any employer, personally or through an agent, to dismiss from employment, or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodations, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business.
>
> In determining whether an accommodation would impose an undue hardship on the conduct of the employer's business, factors to be considered include:-
>
> (1) the overall size of the mployer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;

(2) the type of the employer's operation, including the composition and structure of the employer's workforce; and

(3) the nature and cost of the accommodation needed.

Physical or mental job qualification requirement with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.

An employer may not make preemployment inquiry of an application as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to

voluntarily disclose their handicap for purposes of assisting the employer in its affirmative actions efforts.

The Railway Labor Act, 45 U.S.C. §§151-88 provides in relevant part:

§151a. General purposes.

The purposes of the chapter are (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

§153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided-...

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to an including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes...

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

§184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation of application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or in

either party to an appropriate adjustment board, as hereinafter provided with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and to its employees, acting through their representatives, selected in accordance with the provisions of the subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of

a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

STATEMENT OF THE CASE

In this case, the petitioner William O'Brien, who was born without a right hand, challenges the decision of his employer Consolidated Rail Corporation ("Conrail") to deny him a "stevedore" position solely because of its belief that he could not perform the job because of his physical handicap. The district court, affirmed by the Court of Appeals, held that O'Brien's state statutory discrimination claim was preempted by the Railway Labor Act.

Petitioner O'Brien was employed by Conrail as a yardmaster for more that 10 years. In January of 1988 he was laid off from that position. He

then exercised the undisputed right to "bump" a less senior employee holding the position of "stevedore". 972 F.2d at 2 (A.3). Conrail denied O'Brien this position solely because of its belief that his physical handicap would prevent him from performing two of the many duties of that position: 1.) climbing ladders in adverse weather conditions and 2.) handling "forty pound bridgeplates."[1]

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[1]The company made this determination 3 years earlier in 1985 when O'Brien first sought the stevedore position. At no time did Conrail even consider the question of whether these two duties were essential functions or whether with reasonable accommodations such duties could be performed by O'Brien. See M.G.L. c. 151B, §4(16). O'Brien filed a grievance

Believing that, given the opportunity, he could prove his ability to perform the essential functions of the stevedore position, O'Brien filed an administrative complaint with the Massachusetts Commission Against Discrimination ("MCAD"). He later requested and received permission from the MCAD to file his claim in Massachusetts state court, and he did so. Conrail

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footnote continued

in 1985 under his union's labor contract challenging Conrail's denial of the stevedore position to him. The grievance was eventually submitted to the National Railroad Adjustment Board as provided in the Labor contract. The Board ruled that it was concerned about the case, but was constrained and without authority to review de novo the merits of Conrail's determination. Appendix E-4 to E-6.

removed the action to the Federal District Court pursuant to 28 U.S.C. §1331 and §1332. It then moved for summary judgment alleging inter alia that O'Brien's claim was preempted by the Railway Labor Act ("RLA"). A Magistrate recommended that summary judgment be granted on the basis of RLA preemption, and the district court adopted the magistrate's recommendation and entered summary judgment for Conrail. The United States Court of Appeals for the First Circuit affirmed in a decision dated August 5, 1992 (A-1).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUIT COURTS OVER WHETHER THE LINGLE STANDARD FOR DETERMINING PREEMPTION APPLIES UNDER THE RAILWAY LABOR ACT.

In Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108

S.Ct. 1877, 100 L.Ed.2d 410 (1988), this Court resolved a long-standing debate in the Federal Courts of Appeals when it articulated a straight-forward test for determining when a state law claim is preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 ("Section 301"). This Court held that the LMRA does not preempt state law employment claims of unionized employees unless such claims "require[ ] the interpretation of a collective bargaining agreement." Lingle, 486 U.S. at 413; see also id. at 407 (no premption unless claim "requires construing" the collective bargaining agreement).

The Court in Lingle noted that even when "the state law analysis might well involve attention to the same factual considerations as the contractual determination...," it is not the case that "such parallelism renders the state law analysis dependent upon the contractual analysis." Id. at 408.

> In other words, even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for §301 preemption purposes.

Id. at 410 (footnote omitted).

Following Lingle, the federal courts have uniformly held that state law handicap discrimination claims are not preempted by the LMRA, because the resolution of state law handicap discrimination claims does not depend on any interpretation of the contract. See Miller v. AT&T Network Systems, 850 F.2d 543 (9th Cir. 1988) (en banc); Ackerman v. Western Electric, 860 F.3d 1514 (9th Cir. 1988); O'Shea v. Detroit News, 887 F.2d 683 (6th Cir. 1989); Smolarek v. Crysler Corporation, 879 F.2d 1326 (6th Cir. 1989) (en banc); Cronan v. New England Telephone Co., No. 86-0242-S, 41 Fair Empl. Prac. Cas. (BNA) 1268 (D. Mass. Apr. 11, 1986) (LEXIS, Genfed. library, Dist. file). The reasoning of the

decisions in those cases is that resolution of the issue of whether there has been unlawful discrimination based on a handicap is not dependent upon resolution of any claim under the collective bargaining agreement, regardless of whether an arbitrator might be empowered to address similar issues under the collective bargaining agreement. Statutory discrimination claims require no interpretation of or construing of the collective bargaining agreement.

However, there now exists a split among the Federal Courts of Appeals as to whether the Lingle analysis applies to claims of preemption under the Railway Labor Act. Indeed, at least three different trends have now

emerged in the Circuit Courts regarding the comparative preemptive effect of the LMRA and RLA.

Relying on a statement in dicta in Andrews v. Louisville & Nashville R. Co., 406 U.S. 320, 323, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972), the Sixth and Ninth Circuit Courts of Appeals have held that the RLA has more preemptive effect over state law claims than the LMRA and that the Lingle standard is not applicable under the RLA. See, e.g., Melanson v. United Air Lines, 931 F.2d 558, 562 (9th Cir.), cert. denied, 112 S.Ct. 189 (1991); Grote v. Trans World Airlines, 905 F.2d 1307, 1309 (9th Cir. 1990); Espinosa v. Norfolk & W.R. Co., 750 F.Supp. 819, 825 (E.D. Mich. 1990), aff'd mem., 946

F.2d 894 (6th Cir. 1991); McCall v. C & O Ry. Co., 844 F.2d 294, 304 (6th Cir.)(order denying rehearing after Lingle), cert. denied, 488 U.S. 879 (1988); see also McCann v. Alaska Airlines, Inc., 758 F. Supp. 559 (N.D. Cal. 1991)(applying "inextricably intertwined" test rejected by this Court in Lingle).

Lower courts in the Second and Eight Circuits seem to have arrived at the same conclusion. See Feldleit v. Long Island Railroad, 723 F. Supp. 892, 899 (E.D.N.Y. 1989); Brown v. Holiday Station Stores, Inc., 723 F.Supp. 396, 406 (D. Minn. 1989); Underwood v. Trans World Airlines, 710 F. Supp. 78, 82 (S.D.N.Y. 1989).

At least two other Circuit Courts of Appeals, the Seventh and the Tenth, have held, on the other hand, that the preemptive effect of the LMRA and RLA is identical and thus Lingle controls under both statutes. Davies v. American Airlines, 971 F.2d 463, 466-67 (10th Cir. 1992); Leu v. Norfolk & W. Ry., 820 F.2d 825, 125 LRRM 2390 (7th Cir. 1987); Lancaster v. Norfolk and Western Railway, 773 F.2d 807 (7th Cir. 1985), cert. denied, 480 U.S. 945 (1987).

In Lancaster v. Norfolk and Western Railway, Judge Posner, after analyzing in detail the history and purpose of the RLA and the LMRA, concluded that no persuasive grounds exist to distinguish between the preemptive effect of these two

federal labor statutes. In his words, "it is hard to see why [the RLA] should have more preemptive force than the National Labor Relations Act." 773 F.2d at 816-17. Likewise in Davies, the Tenth Circuit acknowledged that RLA preemption is statutory whereas LMRA preemption is contractual, but concluded that that fact does not affect "the inquiry into whether a claim requires interpretation of a [collective bargaining agreement]." 971 F.2d at 467 n.5, citing Andrews v. Louisville & Nashville R. Co., supra and expressly rejecting the analysis of Grote, supra.

Still other courts have concluded that Lingle does not control the preemption analysis under the RLA,

but is "instructive" to some undefined extent. See Beard v. Carrollton Railroad, 893 F.2d 117, 122 (6th Cir. 1989); Deford v. Soo Line R.R., 867 F.2d 1080, 1086 (8th Cir.), cert. denied, 492 U.S. 926 (1989).

In the present case, the First Circuit, in some places in its opinion, appears to have taken the middle-of-the-road position that LMRA preemption cases, including Lingle, are not controlling but are of assistance in construing the RLA. 972 F.2d at 4, 5. (A-13 to A-15) In others, it states that virtually all labor disputes are preempted by the RLA, id. at 4, quoting McCall, 844 F.2d at 301 (A-18 to A-19), and rules that "the mere fact that O'Brien's

cause of action under Chapter 151B is 'independent' of the RLA says nothing about whether such action is preempted by the RLA." Id. at 3 (A-11). The latter statement is of course tantamount to a rejection of this Court's holding in Lingle that if the state law claim is "independent" of the collective bargaining agreement, it is not preempted by Section 301. See 486 U.S. at 407, 410.[2]

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[2]The Court's rejection of Lingle, at most, or its misapplication of Lingle, at a minimum, is further revealed by its statement that preemption is warranted under both the LMRA and the RLA whenever the case involves "state law claims connected with the collective bargaining agreement." 972 F.2d at 4 (A-19). This is clearly not the Lingle standard.

The First Circuit concluded that O'Brien's physical handicap discrimination claim would "require[] interpretation of the collective bargaining agreement," 972 F.2d at 5 (A-20), but never stated what in the collective bargaining agreement "requires" interpretation in order to decide O'Brien's state statutory discrimination claim.[3]

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[3]Indeed, all that the court below did was identify provisions of the collective bargaining agreement pursuant to which a parallel proceeding could be brought. Such parallelism, however, was clearly rejected by the Court in Lingle as the basis for preemption. See 486 U.S. at 408-10, 412-13. In one place, the court below found that "under the collective bargaining agreement he was entitled to 'bump' the less senior employee filling the position." 972 F.2d at 2 (A-3). Hence, the court's later

Because of the disarray in the lower federal courts over the

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footnote continued

discussion to the effect that the court would have to determine as a "threshold question...O'Brien's eligibility for the job," and hence "would need to interpret the collective bargaining agreement to determine whether it . . . entitled O'Brien to 'bump' the present holder of the Stevedore position," 972 F.2d at 5 (A-22), is inexplicable. Moreover, resolution of this threshold question, like resolution of claims for damages, would not justify preemption of the enire discrimination claim. See Lingle, 486 U.S. at 413 n.12. The First Circuit has generally resisted the notion that this Court meant "require" when it said "require" in Lingle. See Jackson v Liquid Carbonic Corp., 863 F.2d 111, 121 (1st Cir. 1988), cert. denied, 490 U.S. 1107 (1989). In the decision below, the court admitted that the Jackson court's analysis leads to the conclusion that "state law claims arising out of the employment relationship" are preempted. 972 F.2d at 4 (A-16). This is of course inconsistent with the "requires" standard of Lingle.

question of the proper standard for determining RLA preemption, particularly as it affects state law discrimination claims against rail and air carriers, this Court should grant certiorari in this case. See Rules of the Supreme Court of the United States, 10.1(a).

II. THIS COURT SHOULD RESOLVE CONFUSION AMONG THE CIRCUIT COURTS AS TO WHETHER STATE HANDICAP DISCRIMINATION CLAIMS ARE MORE SUSCEPTIBLE TO LABOR ACT PREEMPTION THAN ARE RACE OR OTHER DISCRIMINATION CLAIMS.

Whatever standard governs RLA preemption, there is a confusion among the circuits as to whether handicap discrimination claims are more susceptible to preemption than race, sex, age or other discrimination claims.

The First Circuit has now joined the Sixth Circuit in concluding that handicap discrimination claims are more readily subject to preemption under federal labor statutes than are race discrimination claims, and presumably any other type of discrimination claim.

The court below and the Sixth Circuit in McCall attempted to distinguish this Court's holdings in Colorado Anti-Discrimination Commission v. Continental Airlines, 372 U.S. 174, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963), in which the Court held that state statutory race discrimination claims are not preempted by the Railway Labor Act. See also Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011,

39 L.Ed.2d 147 (1973) (noting distinctness of collective bargaining agreement rights and Title VII rights). The court below contrasted handicap and race discrimination cases by stating, "'racial discrimination [is] conduct that is not by any construction a subject for collective bargaining and arbitration.'" 972 F.2d at 5-6, quoting McCall, 844 F.2d at 302 (A-25 to A-26).

In effect then, the court below and the Sixth Circuit in McCall have concluded that handicap discrimination claims will be preempted by the RLA whenever the collective bargaining agreement contains provisions relevant to the issues that would be litigated in

resolving the discrimination claim, whereas race discrimination claims, and presumably sex and age claims, will never be preempted.[4]

Underlying the rationale of the Sixth Circuit in McCall, the First Circuit in this case and the state court decisions on which the court below relied is a fundamental misapprehension that handicap discrimination claims are unique in terms of placing on the plaintiff

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[4]In support of its holding that handicap claims are more vulnerable to preemption than other kinds of discrimination claims, the court below cited Maher v. New Jersey Transit Rail Opern. Inc., 125 N.J. 455, 593 A.2d 750, 765 (1991); Evans v. Southern Pacific Trans. Co., 213 Cal. App. 3d 1378, 262 Cal. Rptr. 416, 420 (1989), cert. denied, 496 U.S. 936 (1990); and Quinn v. Southern Pacific Trans. Co., 76 Or. App. 617, 711 P. 2d 139, 144 (1985).

the burden of proving she is capable of performing the job in question. In any state law claim of unlawful race, sex or age discrimination where there is no direct proof of discriminatory intent, the plaintiff has the burden of proving that she is qualified to perform the job in question. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) (race; element of prima facie cases is ability to perform the job); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1094 (1981) (sex); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121-22, 105 S.Ct 613, 621-22, 67 L.Ed.2d 207 (1985) (age).

Likewise, in mandatory retirement cases and other bona fide occupational qualification (BFOQ) cases under both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA), the central issue is whether members of the class of persons at issue are or are not able to perform the duties of the job. See, e.g., International Union v. Johnson Controls, ___ U.S. ___, 111 S.Ct. 1196, 1206, 113 L.Ed.2d 158 (1991); Dothard v. Rawlinson, 433 U.S. 321, 335-37, 97 S.Ct. 2720, 2730, 53 L.Ed.2d 786 (1977); Frontier v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976). In such cases, ability to perform the job is

an issue to no greater or lesser extent that in handicap discrimination cases.[5] Hence, across all categories of discrimination claims, there will be cases involving the same types of disputes about the plaintiff's ability to perform the job as there are in handicap discrimination cases. Thus, the rationale of the

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[5]M.G.L. c. 151B, §4(16) is virtually identical to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which was at issue in School Bd. of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). As under the federal act, a plaintiff under M.G.L. c.151B, §4(16), must prove that he or she is qualified and capable of performing the duties of the job, with or without reasonable accommodations. See Conway v. Boston Edison Co., 745 F.Supp. 773 (D. Mass. 1990).

decision below threatens preemption of all state law discrimination claims.

The First Circuit, purporting to apply Lingle to determine RLA preemption, found that the availablity of parallel proceedings under the collective bargaining agreement meant that O'Brien's handicap discrimination claim was preempted. In the lower court's words:

> Perhaps the best indication that fitness and ability are the subject of the collective bargaining agreement is the very grievance that O'Brien brought under this collective bargaining agreement on the issue of his fitness and ability to be a stevedore.

972 F.2d at 5.

The Ninth Circuit, following Lingle, has rejected such an analysis, holding that state handicap discrimination claims are not preempted even when the collective bargaining agreement provides a mechanism for asserting a parallel claim. Ackerman v. Western Electric 860 F.2d 1514 (9th Cir. 1988); Miller v. ATT Network Systems, 850 F.2d 543 (9th Cir. 1988) (en banc).

There is therefore a conflict among the Courts of Appeals over when handicap discrimination claims "require[] the interpretation of a collective-bargaining agreement," Lingle, 486 U.S. at 413, and over whether handicap discrimination, like race discrimination, is "conduct that

is not by any construction a subject for collective bargaining and arbitration.'" Decision below, 972 F.2d at 5-6, quoting McCall, 844 F.2d at 302 (A-25 to A-26).

The status of the law with respect to preemption by federal labor statutes of state handicap discrimination claims needs to be clarified by this Court. See Rules of the Supreme Court of the United States, Rule 10.1(a) and (c).

III. THE FIRST CIRCUIT'S DECISION ALLOWS LABOR UNIONS TO WAIVE THEIR MEMBERS' STATE ANTI-DISCRIMINATION RIGHTS AND CONFLICTS WITH THE REASONING OF PRIOR DECISIONS OF THIS COURT.

In substance, the First Circuit's decision in this case means that O'Brien's right to pursue a state law

handicap discrimination claim was prospectively waived at the bargaining table when the union signed onto the collective bargaining agreement with Conrail. This is in conflict with decisions of this Court.

In Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 167 (1973), this Court held that a union may not waive its members' rights to pursue claims under Title VII of the Civil Rights Act of 1964. The Court distinguished "independent statutory rights accorded by Congress," id. at 49-50, from "certain statutory rights related to collective activity, such as the right to strike," which "are conferred on employees collectively ... and properly may be exercised or

relinquished by the union as a collective bargaining agent to obtain economic benefits for union members." Id. at 51.

> Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of those rights would defeat the paramount purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible to prospective waiver.

Id. at 51-52.

Likewise, in Atchison, Topeka and Sante Fe Ry. Co. v. Buell, 480 U.S. 557, 564-65, 107 S.Ct. 1410, 1415, 94 L.Ed.2d 563 (1986), this Court held

that the availability of the arbitration process for "minor disputes" under the Railway Labor Act does not preclude covered employees from asserting independent statutory rights.

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bring claims under federal statutes. See, e.g., McDonald v. West Branch, 466 U.S. 284 (1984); Barrantine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

Id. (parallel citations omitted).

Then, in Lingle v. Norge Division of Magic Chef, 486 U.S. at 411-12, this Court made clear that the reasoning in Buell, which involved federal statutory rights, applies

equally when the independent rights arise under a state statute, such as M.G.L. c. 151B.

> Although our comments in Buell, construing the scope of Railway Labor Act preemption, referred to independent federal statutory rights, we subsequently rejected a claim that federal law preempts a state statute...

Id., citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21, 107 S.Ct. 2211, 2222, 96 L.Ed.2d 1 (1987).

The clear message of these decisions is that the Courts should be very hesitant to find that Congress, in enacting general federal labor statutes, intended to confer on labor unions the authority to waive the independent statutory rights of their members through the collective bargaining process. This reticence is particularly warranted in the

anti-discrimination area for the reasons articulated in Alexander v. Gardner-Denver Co., 415 U.S. at 49-51.[6]

This was acknowledged by the Court in Lingle, where it stated that:

> The Court of Appeals 'recognize[d] that § 301

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[6]This Court's ruling in Gilmer v. Interstate/Johnson Lane Corp., ___ U.S. ___, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) is not to the contrary. There the Court held that individuals who register as securities representatives with the stock exchanges may individually waive their federal statutory discrimination claims by personally agreeing to arbitrate all controversies with their employers. The Court specifically noted the distinction between individual agreements to arbitrate and agreements made by unions on their members' behalves. 111 S.Ct. at 1657.

> does not preempt state anti-discrmination laws, even though a suit under these laws . . . requires a state court to determine whether just cause existed to justify the discharge.'

486 U.S. at 412, quoting 823 F.2d at 1046, n.17. While the Court found that in Lingle's case, which concerned a state law other than a state anti-discrimination law, the distinction was "unnecessary for determining whether § 301 preempts the state law in question," id., it seemed to endorse, and certainly did not reject, the conclusion that State anti-discrimination laws are not subject to premption under a

Lingle analysis.[7]

In Lingle, this Court relied upon its earlier decision in Fort Halifax Packing Co., 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987), in which the Court emphasized the principles of federalism that are at stake when

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[7]In 1990, Congress enacted a federal prohibition against handicap discrimination in employment, when it enacted the Americans With Disabilities Act ("ADA"), 29 U.S.C. §12101 et seq. Title I of the ADA, which prohibits discrimination in employment, became effective on July 26, 1992, and expressly incorporates state law remedies through the deferral mechanism used under Title VII. 29 U.S.C. §12117. Hence, Congress has endorsed state law handicap discrimination remedies. Cf. Lingle, 486 U.S. at 412 (quoting with apparent approval the lower court's recognition that Congress had endorsed state anti-discrimination laws).

a claim of preemption is raised. Lingle, 486 U.S. at 412, quoting Fort Halifax, 482 U.S. at 21, 23. Where the subject matter "falls within the traditional police power," as does the subject of handicap discrimination, see note 7 supra, "preemption should not be lightly inferred..." Fort Halifax, 482 U.S. at 21. See also San Diego Building Trades Council v. Garmon, 359 U.S. 236, 239, 79 S.Ct. 773, 776, 3 L.Ed.2d 775 (1989) (federal law preemption of state law claims gives "rise to difficult problems of federal-state relations").

In spite of the teachings of Lingle, Fort Halifax and Alexander, the decision of the First Circuit below, like the decisions of the

Sixth Circuit in McCall, supra and its progeny, cedes to labor unions the exclusive power to determine the scope of protection to be afforded their members against handicap discrimination. In every case, there will be some language in a collective bargaining agreement to which an employer can point as being relevant to the question of what is the scope of a job in question, or to the question of whether the employer's action was warranted as a matter of contract. For instance, almost every collective bargaining agreement continains language concerning eligibility for promotions, etc. Moreoever, most contracts contain an anti-discrimination provision.

This Court in Lingle made clear that "such parallelism [does not] render[] the state law analysis dependent upon the contractual analysis..." 486 U.S. at 408. The Court in Lingle further stated that:

> the mere fact that a broad contractual protection against discriminatory . . . discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state law violation dependent upon the terms of the private contract. For even if an arbitrator should conclude that the contract does not prohibit a particular discriminatory [action], that conclusion might or might not be consistent with a proper interpretation of state law.

Id. at 412. Yet, under the reasoning of the court below, virtually every case of handicap discrimination

brought by a unionized employee pursuant to state statute will hereinafter be preempted either by Section 301 of the LMRA or the Railway Labor Act.[8]

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[8]Under the First and Sixth Circuit approach, only non-unionized employees and applicants for positions will be ever able to pursue state law handicap discrimination claims and obtain judicial review of such claims, because there will almost always be some language in a collective bargaining agreement that will in some way be relevant to a discrimination claim. Under the Ninth Circuit approach, and the approach suggested by this Court in Colorado Anti-Discrimination Commission, supra, all citizens would be free to avail themselves of their states' anti-discrimination laws, and to receive the protections afforded by the federal process. But cf. Lingle, 486 U.S. at 407 n.7 (fact that unionized and nonunionized workers will be treated

The result of the First Circuit's decision will be to ensure that all claims of handicap discrimination by unionized employees will hereinafter be brought in federal court under the Americans with Disability Act ("ADA"). See note 7 supra. The system of bringing such claims in state court under state handicap discrimination laws will be entirely foreclosed. The dockets of the federal courts will swell beyond what would otherwise have been the case based solely on enactment of the ADA. Moreover, the States will be moved to the side-lines in the battle against handicap discrimination, a

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footnote continued

differently is not determinative in preemption analysis).

result that Congress clearly did not intend. See 29 U.S. §12117 (incorporating state law remedies) and §12201 (ADA does not preempt state handicap discrimination laws).

The decision below is inconsistent with the line of cases beginning with Alexander v. Gardner-Denver, supra and continuing through Lingle, and the proposition that unions should not be allowed to supplant state governments in the realm of protecting or not protecting their members from discrimination in employment. For that reason, the petition for writ of certiorari should be granted. See Rules of the Supreme Court of the United States, Rule 10.1(c).

CONCLUSION

For the reasons set forth above, William J. O'Brien respectfully requests that this petition be granted.

Respectfully submitted
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Dated: November 3, 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1086

WILLIAM J. O'BRIEN
Petitioner,

v.
CONSOLIDATED RAIL
CORPORATION

Defendant, Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTS.

DISPOSITION: Affirmed.

August 5, 1992 Decided

[Hon. William Young,
U.S. District Judge]

Before

Selya, Circuit Judge
Lay, *Senior Circuit Judge
O'Scannlain, ** Circuit Judge

* Of the Eighth Circuit, sitting by designation.
** Of the Ninth Circuit, sitting by designation.

Opinion By: O'Scannlain

O'SCANNLAIN Chief Judge.

We must decide whether a state law providing for physical handicap discrimination claims against employers is pre-empted by the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-88.

I.

In August 1985, William J. O'Brien was laid off by Consolidated Rail Corporation ("Conrail") from his position as yardmaster in the Boston area. O'Brien declined Conrail's offer of a position in Springfield, Massachusetts and instead applied for a stevedore position with Conrail, also in the Boston area. Although such position was already filled,

O'Brien had eight and one-half years of seniority with Conrail and under the collective bargaining agreement he was entitled to "bump" the less senior employee filling the position.

O'Brien was born without a right hand. The supervisor of the stevedoring operation told O'Brien he was disqualified from being a stevedore because he was physically incapable of performing the duties of a stevedore. O'Brien requested a field test to refute the supervisor's contention. Six Conrail employees conducted the field test, and concluded that O'Brien could not safely perform all of the duties of a stevedore. In particular, the six-member committee determined that O'Brien would not be able to climb ladders safely in adverse weather,

and would not be able to handle safely the forty-pound "bridge plates" unsed in the stevedoring operation.

O'Brien filed a grievance under the procedures provided by the collective bargaining agreement, claiming that Conrail violated the antidiscrimination provision of such agreement. The grievance was first denied by the Manager-Labor Relations at Conrail, and later by Conrail's Senior Director-Labor Relations. O'Brien then submitted the matter to the National Railroad Adjustment Board ("NRAB"), which was created by the RLA to resolve labor disputes in the railroad industry. The NRAB denied O'Brien's grievance.

O'Brien also filed a complaint with the Office of Federal Contract Compliance Programs ("FCCP"), which investigates complaints of unlawful employment discrimination lodged against federal contractors such as Conrail. The OFCCP determined that Conrail had not violated the antidiscrimination provisions of its contract with the government. O'Brien sought reconsideration by the Director of the OFCCP, who affirmed the determination of the OFCCP.

Eventually, O'Brien was called back from layoff by Conrail to his former yardmaster job. In January 1988, however, O'Brien was again laid off. O'Brien wrote to the stevedoring supervisor requesting to "bump" an employee in a stevedore position, and the supervisore replied

that "Conrail's prior determination still stands."

On March 14, 1988, after he had requested the stevedore position but before his request was denied, O'Brien filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD"), a prerequisite to bringing an action in court for a violation of the state antidiscrimination law. O'Brien alleged that Conrail has violated Massachusetts General Laws Chapter 151B ("Chapter 151B"), which prohibits discrimination on the basis of physical or mental handicap, if the handicapped person is "capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the

accommodation required ... would impose an undue hardship to the employer's business." Mass. Gen. L. ch. 151B, § 4. The MCAD permitted O'Brien to file suit in Massachusetts state court, and he did so.[1]

Conrail petitioned to remove the case to United States district court, alleging that the district court had diversity jurisdiction and jurisdiction under 28 U.S.C. § 1337(a), which grants federal

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[1]In his state court complaint, O'Brien also alleged breach of the convenant of good faith and fair dealing in his employment contract and violation of his rights under the Massachusetts Constitution, Amendment Article 114. On the recommendation of the magistrate judge, these counts were dismissed by the district court, and O'Brien does not challenge such dismissals on appeal.

jurisdiction over all "civil actions ... arising under any Act of Congress regulating commerce." The district court granted the removal petition.

Conrail then moved for summary judgment on the following grounds: (1) O'Brien's claims were pre-empted by the RLA, (2) O'Brien's claims were pre-empted by Section 503 of the Rehabilitation Act, (3) the adverse determinations of the NRAB and the OFCCP had preclusive effect on O'Brien claims, and (4) O'Brien's claim under Chapter 151B was barred by a six month Statute of Limitations. A hearing on the Motion was held before U.S. Magistrate Judge Marianne Bowler.

The magistrate judge recommended that summary judgment be granted for Conrail on all the grounds urged by Conrail except the Statute of Limitations theory. The district court adopted the recommendations of the magistrate judge in whole and entered summary judgement for Conrail. O'Brien timely appealed.

II.

O'Brien argues that the district court erred in determining that his claim was barred because his state statutory rights under Chapter 151B are independent of and exceed his rights under the RLA and the collective bargaining agreement with Conrail. O'Brien contends that the

resolution of his claim under Chapter 151B hinge[s] upon the meaning to be given the terms of the statute involved, and not those within the collective bargaining agreement," and thus that the RLA and the collective bargaining agreement are simply not implicated, let alone pre-emptive.

A.

Preemption doctrine is founded on Article VI, Clause 2 of the Constitution, which states "the Laws of the United States . . . shall be the supreme Law of the Land." Under the Supremacy Clause, "state laws that interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." Wisconsin Pub. Intervenor v. Mortier, ___ U.S. __, 111 S. Ct. 2476, 2481, 115 L.Ed. 2d 532 (1991)

(quoting Gibbons v. Ogden, 22 U.S. 1, 71 (1824)). Thus, the mere fact that O'Brien's cause of action under Chapter 151B is "independent" of the RLA says nothing about whether such action is preempted by the RLA. Indeed, in any case where preemption doctrine is applied, there will be a state law cause of action "independent" of federal law. Rather, the critical issue is whether the state law, Chapter 151B, "interferes with" the federal RLA.

"'Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" Morales v. Trans World Airlines, Inc., ___ U.S. __, 112 S.Ct. 2031, 2036, 119

L.Ed. 2d 157 (1992) (quoting FMC Corp. v. Holliday, ___ U.S. __, ___, 111 S. Ct. 403, 407, 112 L.Ed.2d 356 (1990)). Where, as here, express pre-emption is absent,

> the challenged state law must yield when it "requlates conduct in a file that Congress intended the Federal Government to occupy exclusively" ... [or] where arises where it is physically impossible to comply with both the federal and the state law or where "state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."

Pedraza v. Shell Oil Co., 942 F.2d 48, 51 (1st Cir. 1991) (quoting English v. General Elec. Co., 496 U.S. 72, 79, 110 S. Ct. 2270, 2275, 110 L.Ed. 2d 65 (1990)), cert. denied, ___ U.S. ___, 112 S. Ct. 993 (1992)). Hence, we consider whether

the RLA evinces a congressional intent to occupy the field of railroad labor relations and whether separate state causes of action such as Chapter 151B undermine the "full purposes and objectives of Congress" in enacting the RLA.

This court has not previously had occasion to determine the scope of preemption under the RLA. We have, however, examined preemption under the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-87. See Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988), cert. denied, 490 U.S. 1107, 109 S.Ct. 3158, 104 L.Ed. 2d 1021 (1989). The LMRA and the RLA are similar in many respects: "[a]lthough the preemptive effect of ... the Labor Management Relations Act ... cannot be 'imported

wholesale into the railway labor arena,' courts may look to the construction of other federal labor statutes for assistance in construing [the RLA]." McCall v. Chesapeake & Ohio Ry. Co., 844 F 2d 294, 299 (6th Cir. (quoting Brotherhood of R.N. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383, 89 S.Ct. 1109, 1118, 22 L.Ed. 2d 344 91969), cert. denied, 488 U.S. 879, 109 S.Ct. 196, 102 L.Ed. 2d 166 (1988).

In Jackson, an employee challenged drug testing by his employer under Massachusetts' privacy laws. Jackson, 863 F.2d at 113. The employer contended that the employee's Massachusetts causes of action were barred, state law having been preempted by the federal LMRA. Id. The court observed that "under

state law, Massachusetts would look to the [collective bargaining] Agreement to discern the scope of the privacy right which [the employee] was attempting to assert." Id. at 120. The court then held that "[b]ecause resolution of [the employee's] state-law claims requires the interpretation of a collective bargaining contract,' . . . it follows inexorably, as night unto day, that [the LMRA] preempts maintenance of the suit in its present form." Id. at 122 (quoting Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 409 n.8, 108 S. Ct. 1877, 1883 n.8, 100 L.Ed. 2d 410 (1988)).

We believe that the holding of Jackson is equally applicable to asserted RLA preemption. The Jackson

court concluded that to allow state law claims arising out of the employment relationship to be brought in court would undermine the scheme for labor dispute resolution established by Congress.

> We are mindful of the need to preserve the central role of arbitration in our system of industrial self-government .... The ordering and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. Grievance and arbitration are important cogs in the machinery. A plaintiff should not be allowed to bypass the grievance procedures established by the labor contract in a case where his claims are so clearly dependent on interpretation of the terms of that contract. Allowing such an end run would surely undermine the structure of industrial self-government.

Id. at 121-22 (quotations and citations omitted).

Such concerns are equally present here. The RLA established a comprehensive conflict resolution procedure for railroad labor disputes. The RLA divides disputes into major disputes, those relating to the formation or existence of collective bargaining agreements, and minor disputes, which concern rights under an existing collective bargaining agreement. See Consolidated Rail Corp. v. Railway Labor Exec. Ass'n, 491 U.S. 299, 302, 109 S.Ct. 2477, 2480, 105 L.Ed.2d 250 (1989). "In the event of a major dispute, the RLA requires the parties to undergo a lengthy process of bargaining and mediation." Id. In the event such mediation fails, the

RLA provides for arbitration of major disputes. Id., 491 U.S. at 302 n.3, 109 S.Ct. at 2480 n.3. "A minor dispute in the railroad industry is subject to compulsory and binding arbitration before the National Railroad Adjustment Board. The Board... has exclusive jurisdiction over minor disputes." Id. at 2481-81.

Thus, the RLA "envision[s] binding administrative proceedings into which virtually all individual labor-management disputes are directed." McCall, 844 F.2d at 301. The RLA's procedures were designed for quick and efficient dispute resolution. Union Pac. Ry. v. Sheehan, 439 U.S. 89, 94 (1978) (per curiam). "The federal act was intended to serve the interests of railroad employees by creating a

statutory scheme providing for the final settlement of grievances by a tribunal composed of people experienced in the railroad industry." McCall, 844 F.2d at 301.

As in the case of the LMRA, to permit litigation in court of state law claims connected with the collective bargaining agreement would undermine the purposes behind the RLA. "If the federal dispute resolution mechanism is to have any force, juries cannot be allowed to second-guess the decisions of arbitration boards." Id. at 302. Congress' intent that industry-based grievance and arbitration proceedings be used to resolve labor-management disputes in the railroad industry would be frustrated if employees (or employers) could bring actions

requiring interpretation of the collective bargaining agreement in court, based on state law. Costly litigation would replace efficient grievance and arbitration procedures.

B.

Having concluded that the pre-emption rule of Jackson governs here, we turn to applying it. Would resolution of O'Brien's physical handicap discrimination claim under Chapter 151B "require interpretation of collective bargaining contract?" We believe it would.[2]

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[2]O'Brien argues that Chapter 151B holds Conrail to a different and higher standard of conduct than Conrail's duties under the collective bargaining agreement because Chapter 151B contains a "reasonable accommodation" requirement. We do not need to decide whether that is correct

In order to determine whether Conrail had unlawfully discriminated against O'Brien, we would first have to ascertain whether O'Brien was otherwise eligible for the stevedore position he sought. That is, aside from his handicap, would O'Brien be eligible? To answer this question we would have to resort to the collective bargaining agreement. O'Brien was laid off from his job as yardworker in the Boston area, Court Council offered him another position in Springfield, Massachusetts, where O'Brien had worked before. Further, no stevedore positions were vacant in

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because we conclude to the extent that O'Brien's state law claim requires interpretation of the collective bargaining agreement such claim is preempted under Jackson.

the Boston area. Thus, as a threshold issue to determine O'Brien's contractual eligibility for the job, we would need to interpret the collective bargaining agreement to determine whether it entitled O'Brien to refuse to return to Springfield, and whether it entitled O'Brien to "bump" the present holder of the stevedore position.

More fundamentally, addressing the merits of O'Brien's claim of physical handicap discrimination would require us to assess O'Brien's fitness and ability to perform safely the functions of a stevedore. Yet an employee's fitness and ability are governed by the rules and procedures contained in the collective bargaining agreement. Rule 49 of the collective bargaining agreement sets

forth the method by which an employee's physical fitness to perform his job is determined. Rule 50 describes Conrail's obligations to accommodate disabled and incapacitated employees. Perhaps the best indication that fitness and ability are the subject of the collective bargaining agreement is the very grievance that O'Brien brought under this collective bargaining agreement on the issue of his fitness and ability to be a stevedore. Chapter 151B requires a court to determine whether the plaintiff is a "qualified handicapped person," but this determination would be impossible to make without reference to the collective bargaining agreement.

Hence, we hold, following Jackson, O'Brien's claim under Chapter 151B is barred because resolution of his claim would require interpretation of the collective bargaining agreement. [3] This

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[3]The New Jersey Supreme Court has recently held that "allowing [an aggrieved employee] to bring his claim of handicap discrimination before the courts would interfere impermissibly with Congress's intent that the Adjustment Boards be the sole arbiter of claims related to railroad 'rules and working conditions.'" Maher v. New Jersey Transit Rail Oper., Inc.,. 593 A.2d 750, 765 (N.J. 1991). Similarly, the California Court of Appeal has stated that "[i]f an employee's lack of fitness to perform his job is made arbitrable under the parties' collective bargaining agreement, the present action is preempted insofar as it alleges discrimination based on physical handicap because it raises an issue determinable solely under procedures established by the RLA." Evans v. Southern Pacific Trans. Co., 262 Cal. Rptr 416, 420

holding is not inconsistent with Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963), which held that a state racial discrimination claim statute was not preempted by the RLA. Resolution of the question of whether an employer was engaged in racial discrimination would not require interpretation of the collective bargaining agreement. As the Sixth Circuit has noted, "racial discrimination [is] conduct that is

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(Cal. App.), review denied, (1989) cert. denied, 496 U.S. 936 (1990). See also Quinn v. Southern Pacific Trans. Co., 711 P.2d 139, 144 (Or. App. 1985) (because neither party argued that employee's physical handicap discrimination claim under Oregon law "implicate[d] any provision of a collective bargaining agreement," Oregon law was not preempted by the RLA), review denied, 715 P.2d 93 (Or. 1986)

not by any construction a subject for collective bargaining and arbitration." McCall, 844 F.2d at 302.

"In enacting [the RLA], Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements." Union Pacific Ry., 439 U.S. at 94, 99 S.Ct. at 402. The procedures provided by the RLA were intended "to secure the prompt, orderly, and final settlement of grievances that arise daily between employees and carriers." Id. O'Brien has fully availed himself of such procedures.

To permit him to relitigate the issue of his physical fitness by way of a claim under a state physical handicap discrimination law would clearly conflict with the "prompt, orderly, and final settlement of grievances" sought by Congress in enacting the RLA's dispute resolution procedures.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 88-2591-N

WILLIAM J. O'BRIEN,
Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant.

REPORT AND RECOMMENDATION RE: DEFENDANT CONRAIL'S MOTION FOR SUMMARY JUDGMENT (DOCKET #215) AND MOTION TO AMEND ANSWER (DOCKET #31)

August 8, 1990

Bowler, U.S.M.

The defendant, Consolidated Rail Corporation ("Conrail") has moved for summary judgment on the plaintiff, William J. O'Brien's ("O'Brien") claim that Conrail unlawfully discriminated against him

on the basis of a physical handicap. O'Brien claims that the alleged discrimination is a violation of M.G.L. c. 151B, the Massachusetts Constitution, Amendment Article 114, his employment contract with Conrail and its covenant of good faith and fair dealing. Conrail denies the allegations.

The bases for Conrail's motion are preemption, preclusion and failure to file within the applicable statute of limitations. This action was filed in the Superior Court of the Commonwealth of Massachusetts on October 21, 1988, and Conrail Petitioned for Removal on November 17, 1988. Conrail's ground for removal was

this court's jurisdiction pursuant to the Railway Labor Act, 45 U.S.C. §151 et seq. ("RLA"). O'Brien filed an Opposition to the Petition for Removal and a Motion for Remand (Docket #5), arguing that the gravamen of the complaint was Conrail's alleged violation of Massachusetts' anti-discrimination law, M.G.L. c. 151B, §4(16) and alleged violation of the Massachusetts Constitution, Amendment Article 114, and that the action was more properly filed in state court. Further, O'Brien argued that this court did not have original and exclusive jurisdiction over this claim under the RLA. O'Brien objected to Conrail's characterization of the case as a

contractual dispute between employer and employee. The Petition for Removal was allowed by Nelson, D.J., on December 2, 1988.

On June 29, 1990, Conrail moved for leave to file an Amended Answer (Docket #31), raising for the first time an express statute of limitations defense. As grounds, Conrail states that justice requires the amendment be allowed in order that all issues existing between the parties be fully litigated, that O'Brien will not be prejudiced by allowance of the motion and that it will secure a just, speedy and inexpensive determination of this action pursuant to Fed. R. Civ. P. 1. O'Brien opposes the motion (Docket #33) on the grounds that it

is untimely and that Conrail has not asserted any basis for excusing the untimeliness. In addition, O'Brien asserts that the amendment is futile and that he would be unduly prejudiced by allowance of the motion.

Undisputed Facts[1]

O'Brien was born without a

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[1]Conrail's Statement of Undisputed Facts, (Docket #23), filed pursuant to Rule 18, follows in summary form. O'Brien, in his brief, failed to dispute the factual assertions of Conrail in any meaningful form and they are thus deemed admitted. O'Brien's Statement of Undisputed Facts, (Docket #26), is made up almost entirely of conclusory legal assertions and, in the rare instance where a factual assertion can be discerned, the cited authority or documentation fails to support the facts asserted. Local Rule 18 is unambiguous in its requirement that

> "[O]ppositions to motions for summary judgment shall include a concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation.
>
> .....

right hand on February 14, 1955. He was hired by Conrail on February 15, 1977, rising from a position of crew dispatcher to Assistant Yardmaster and finally, Yardmaster. O'Brien submitted a handicap certification form to Conrail in February, 1984, in conformity with Conrail's requirements. Conrail has an affirmative action policy which includes qualified handicapped individuals.

On August 27, 1985, O'Brien sought to "bump" a less senior

> Material facts set forth in the statement required to be served by the moving party will be deemed for purposes of this motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties."

Conrail employee who held a stevedore position. On that same date, a Conrail supervisor informed O'Brien that he was disqualified for the stevedore position because of his missing right hand. On September 9, 1985, O'Brien filed a claim for compensation under the governing union contract for working days lost as a stevedore since August 27, 1985. The sole reason for disqualification was O'Brien's missing right hand and Conrail's determination that O'Brien would be unable to perform the stevedore job because of this handicap.

On September 25, 1985, O'Brien was given a field test before a committee of six Conrail employees in which he was allowed to demonstrate his ability to perform as a stevedore. While O'Brien met all non-medical requirements, it was determined as a result of the field test that O'Brien was not qualified for the stevedore position. The specific grounds for this determination were that O'Brien would not be able to climb ladders safely under snow and ice conditions and would not be able to handle 40 pound bridge plates used in the stevedore operation and that such inability would pose a safety hazard to O'Brien and to other Conrail employees.

O'Brien filed a Complaint of Discrimination in Employment under Federal Government Contracts against Conrail with the Office of Federal Contract Compliance Programs (OFCCP). Conrail filed its initial responses to the OFCCP Complaint by letters dated January 6, 1986, and February 27, 1986. On March 10, 1986, O'Brien was interviewed by the OFCCP's Equal Opportunity Specialist. The OFCCP issued its Notification of Results of Investigation on on May 22, 1986, concluding that Conrail "did not violate its obligations under the nondiscrimination and affirmative action provisions of Section 503 [of the Rehabilitation Act of 1973, 29 U.S.C. §793] as amended." O'Brien

requested review of the OFCCP's decision, pursuant to 41 CFR 6-741.26(g) by letter dated June 17, 1986. The review had not been completed at the time of the hearing on this motion.

In addition, O'Brien's claim was taken by the union to the Manager-Labor Relations on October 15, 1985, and was denied by letter dated January 10, 1986. The union and Conrail prepared a Joint Submission for the progression of O'Brien's claim to the Senior Director-Labor Relations, Conrail's highest appellate officer, and the claims was denied by letter dated August 11, 1986.

By letter dated August 9, 1987, O'Brien served notice of his intent to submit his claim against Contrail to the National Railroad Adjustment Board, Third Division ("NRAB") pursuant to 45 U.S.C. First (i). O'Brien made two submissions to the NRAB, one dated January 11, 1988, and the other undated. On June 29, 1989, the NRAB issued an Award and Order denying O'Brien's claim.

On January 8, 1988, O'Brien was again notified of a layoff. He sought to "bump" into a stevedore position by letter dated March 11, 1988, stated that he "continue[d] to press [his] position that [he was] entitled to displace a junior stevedore with like position during present furlough."

By letter dated April 4, 1988, Conrail informed O'Brien that his "situation had been reviewed and Conrail's prior determination still stands."

On March 14, 1988, O'Brien filed a Complaint with the Massachusetts Commission Against Discrimination ("MCAD"). On October 6, 1988, the MCAD assented to O'Brien's request to remove his case from the MCAD in order to file a civil action in court. That action, O'Brien v. Conrail, Suffolk Superior Court, Civil Action No. 88-6010-E was commenced on October 20, 1988, and removed to U.S. District Court on December 2, 1988.

DISCUSSION

Summary judgment is permissible when "there is not genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The entire record must be viewed in the light most favorable to the party opposing summary judgment with all reasonable inferences drawn in that party's favor. Mack v. Great Atlantic and Pacific Tea Company, 871 F.2d 179, 181 (1st Cir. 1989).

Relying on documents and pleadings as well as substantive law, Conrail argues that O'Brien's claim is a single, straightforward claim alleging unlawful discrimination due to physical handicap. Conrail

contends that O'Brien's three causes of action,[2] all based on state law, are preempted by federal law, i.e. both the RLA (45 U.S.C. §151 et seq.) and Section 503 of the Rehabilitation Act of 1973, 29

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[2]The court finds that O'Brien's claims for breach of the covenant of good faith and fair dealing in this employment contract (Count II) and for violation of the Massachusetts Constitution, Amendment Article 114 should be dismissed. There is no common law claim for breach of the covenant of good faith and fair dealing, Grubba v. Bay State Abrasives, 803 F.2d 746 (1st Cir. 1986). Under Massachusetts law common law claims of handicap discrimination are barred and the sole remedy is under M.G.L. c. 151B. Melley v. Gillette Corp., 19 Mass. App. Ct. 511 (1985) affirmed 397 Mass. 1004 (1986). The Massachusetts Civil Rights Act, M.G.L. c. 12, §11I provides a "fully adequate procedural vehicle" for pursuit of a claim based upon an alleged violation of Article 114. Grubba, supra at 748.

U.S.C. §793 ("Section 503"), and that the decisions of the NRAB and the OFCCP are entitled to preclusive effect. In addition, Conrail also argues that M.G.L. c. 151B is O'Brien's sole viable cause of action and that it is barred by the applicable statute of limitations, M.G.L. c. 151B, §5.[3]

A. Preemption

In Preemption analysis,

> '[t]he purpose of Congress is the ultimate touchstone.' Where the pre-emptive effect of federal enactments is not explicit, "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts

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[3]Conrail's third argument is inextricably intertwined with its Motion for Leave to file Amended Answer, (Docket #31) and shall be considered separately.

> discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the state.'"

Metropolitan Life Insurance Company v. Massachusetts, 471 U.S. 724, 797-98 (1985) (citations omitted).

The treatment of implied preemption issues by the circuit courts is abundant but not always uniform due to the factual inquiry and balancing that is required by an analysis of implied preemption. "[B]ecause Congress has refrained from providing specific directions with respect to the scope of preempted state regulation, the court has been unwilling to 'declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between

employees, employers and unions...'" Farmer, Special Administrator v. United Brotherhood of Carpenters & Joiners of America, Local 25, et al., 430 U.S. 290, 295-96 (1977) (citing Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971)). In somewhat analogous cases involving the National Labor Relations Act, 29 U.S.C. §151 et seq., rather than the RLA as presented here, the Supreme Court has utilized a standard of "balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation." Farmer, Special Administrator; 430 U.S. at 300. The cases "demonstrate that

the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." Vaca v. Sipes, 386 U.S. 171, 180 (1967).

After reviewing the various circuit decisions involving the issue of whether state law claims are preempted by the RLA, this court finds the analysis and decision of McCall v. Chesapeake & Ohio Railway Co., 844 F.2d 294 (6th Cir. 1988), cert. denied 109 S. Ct. 196 (1988) to be directly on point and the most persuasive in deciding the instance

case. McCall was a locomotive engineer who was not allowed to serve as an engineer or as a fireman for the defendant railroad, because he was a diabetic requiring insulin. The defendant's policy restricted insulin-requiring diabetics from operating mobile equipment, working in proximity to dangerous or moving equipment, working at unprotected elevations or working alone. McCall proceeded under the dispute resolution structure provided by his collective bargaining agreement which was the type of voluntary adjustment board provided for by the RLA. The board found against McCall. He brought suit in state court for violation of the Michigan Handicappers Civil

Rights Act, Michigan Comp. Laws Ann. §37.1101 et seq. (1985). The action was removed to federal court and at trial the jury returned a verdict for the plaintiff. On appeal, the defendant argued that the RLA preempted the state cause of action. The court of appeals agreed, and the judgment was vacated.

The analysis in McCall focused on the issue of whether the state anti-discrimination statute was in conflict with the federal statute. It did not find an across-the-board federal interest in regulating employment discrimination that supercedes a state's interest entirely, however, it did find that the RLA arbitration board in McCall

"had to make essentially the same decision--whether [the plaintiff] is physically able to perform the duties of his job," as the fact finder would in hearing the state claim. McCall, 844 F.2d at 301. Thus, the purposes of railway labor arbitration would be frustrated by allowing the plaintiff to litigate an issue on the merits before an arbitration board created pursuant to the RLA, and "then relitigate the identical issue in an independent judicial proceeding." Id. (citing Andrews v. Louisville & N.R.R., 406 U.S. 320, 325 (1972)).

This Court agrees with the Sixth Circuit's reasoning that

> the policy of the railway act is to channel dispute resolution to either the national board or the various

> voluntarily established boards. The exercise of state power over an area of activity specifically relegated to the railway act dispute resolution process therefore gives a danger of conflict with national labor policy great enough to mandate preemption.
>
> ....
>
> If the federal dispute resolution mechanism is to have any force, juries cannot be allowed to second-guess the decisions of arbitration boards.

McCall, 844 F.2d at 301-302.

The McCall court distinguished its decision from that of Colorado Anti-Discrimination Comm. v. Continental Airlines, 372 U.S. 714 (1963), which involved a claim of racial discrimination, by noting that racial discrimination is conduct that "is not by any construction a subject for

collective bargaining and arbitration." McCall, 844 F.2d at 302. The distinction between a claim involving alleged discrimination on the basis of physical handicap and one of alleged race discrimination is the difference in inquiry a fact finder must pursue in order to reach a finding. A claim of racial discrimination concerns an inquiry into "whether the motivation for the challenged action was the employee's race." Id. In the case of handicap discrimination case,

> The inquiry must go further: once it is established that the challenged action was taken on account of the employee's physical condition, it must also be determined that the employee's physical condition is unrelated to job performance. It is the

> necessity of the second level of inquiry which leads to the conclusion that the state claim is preempted in this case.

Id.

Both the plaintiff in McCall and O'Brien had specific physical conditions that the respective arbitration boards determined affected their ability to perform their jobs. The same determination would have to be made by the fact-finder in the instant action. The substantial similarities between the Michigan Statute and M.G.L. c. 151B lead this court to adopt the McCall court reasoning that

> [t]he state legislation in this case relates directly to the employee's ability to perform and contravenes the process set out by Congress and agreed to by the parties through collective bargaining...to decide 'the

> physical fitness of the engineer to continue in service of the carrier,' which is itself a matter subject to extensive federal regulation.

McCall, 844 F.2d at 303.

The cases cited by O'Brien involving handicap discrimination and RLA preemption, Muncy v. Norfolk & Wester Ry. Co., 651 F.Supp. 641 (S.D.W.Va. 1986), Evans v. Southern Pacific Transportation Co., 213 Ca. App. 3d 1378, 262 Cal. Rptr. 416 (1980), appeal pending, and Santoni Roig v. Iberia Lineas Areas de Espana, 688 F.Supp. 810 (D.Puerto Rico 1988) are distinguishable from the case at bar. Muncy, was premised on reasoning that held that discrimination on the basis of age, race and handicap were analogous. This court finds that this analysis

is not persuasive because it generalizes and paints with too broad a stroke what is a fairly specific inquiry. Evans was decided on the grounds that the defendant failed adequately to support its motion for summary judgment with evidence that the claims of the plaintiff were committed to the arbitration process. Finally, Santoni Roig, supra, although a decision of a district court of this circuit, is factually distinct from the instant case in that the statutes at issue concerned the minimum wage and severance pay due under Puerto Rico law. The court classified both statutes as "minimum standards required by the state" with "no direct impact on the

collective bargaining process or the right of self organization." Santoni Roig, 688 F.Supp. at 816. The inquiry did not turn on the issue of qualification, nor did the court address the issue of litigating the merits of a claim after review of the identical facts and issues by an arbitration board. One could not reasonably argue that minimum wage and severance pay issues are industry-specific, and thus better left to the pervasive regulatory scheme. A strong argument can be made, however, that physical qualification for a certain position within an industry is a determination best made by industry members themselves within the pervasive regulatory framework.

Upon these facts, O'Brien's claim of handicap discrimination under state law must be preempted by the RLA. Conrail argues that under Howard v. Uniroyal, Inc., 719 F.2d 1152 (11th Cir. 1983), O'Brien's claims are preempted by Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793. In Howard, the court found that the regulatory scheme of the statute, the dominant federal interest, the danger of conflict with varying state laws, and the interest in avoiding the thwarting of the objectives of informal dispute resolution warranted a finding of preemption of plaintiff's third-party beneficiary contract claim. Howard is persuasive in determining that O'Brien's state law

claims are preempted by Section 503, although the analysis of McCall provides a more substantial basis for finding that the state law claims are preempted by the RLA.

B. ISSUE PRECLUSION

This court finds that the administrative proceedings before the NRAB and the OFCCP are both entitled to preclusive effect in this action.

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-422 (1966).

The procedural requirements for the NRAB proceedings are found at 45 U.S.C. §153 and for the OFCCP proceedings at 41 C.F.R. §60-741.20 to §60-741.32. Both are comprehensive regulatory schemes which involve "essential elements of adjudication." Restatement (Second) of Judgments §83. The various reports and findings from both the NRAB and the OFCCP indicate that each was concerned with the issue of whether O'Brien was physically qualified to perform the duties of a stevedore.[4] Both determined that

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[4]The OFCCP also specifically found that "complainant [O'Brien] failed to take the reasonable accommodation given by the respondent [Conrail]." (Conrail's Ex. A, p.23).

O'Brien was not physically qualified for the position.

In a proceeding under M.G.L. c. 151B, §4(16),[5] a plaintiff must prove that he/she is a

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[5]It shall be an unlawful practice:

> For any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business (M.G.L. c. 151B §4(16)).

qualified handicapped person. O'Brien has carried this buffer through both administrative proceedings, and their findings must be given preclusive effect.

C. Amendment of Answer

(Docket #31)

Conrail asserts a third basis for summary judgment which relies upon a statute of limitations defense not raised in its Answer to the Complaint. Conrail has moved to amend the Answer, stating that M.G.L. c.151B, §5 requires that a complaint to the MCAD must be tried within six months of the alleged act of discrimination. Christo v. Edward G. Boyle Ins. Agency, Inc., 402 Mass. 815, 816 (1988).

In view of the prior reasoning in Sections A and B, a decision concerning amendment of the answer is essentially moot. However, in an effort to be complete, Conrail's motion shall be considered.

Fed.R.Civ.P. 9(c) requires a party to plead affirmatively its defenses. If not done at the outset, a party may amend or supplement its answer under the provisions of Fed.R.Civ.P. 15(a). If a party moves for leave of court, the rule requires that "leave shall be freely given when justice so requires."

In determining whether leave to amend should be granted, the court is guided by the following

factors: whether bad faith, repeated failure to cure, futility, undue delay or undue prejudice to the plaintiff were present. Perlmutter v. Shatzer, 102 F.R.D. 245, 247 (D. Mass 1984) (citing Foman v. Davis, 371 U.S. 178, 182 (1962) and Farkas v. Texas Instruments, Inc., 429 F.2d 849 (1st Cir. 1970)).

Conrail has not stated any reason for its failure to raise the statute of limitations defense before this time. However, there is no evidence of bad faith or intentional delay, nor has Conrail repeatedly failed to cure. While the delay was lengthy (November 17, 1990 to June 29, 1990, a period of nineteen months), it is not determinative of this issue.

O'Brien argues that the amendment is futile because a continuing act of discrimination brings the claim within the six month period. Based upon the undisputed facts, this assertion appears problematic, although the Court cannot say as a matter of law that a jury could not find a continuing act of discrimination. O'Brien also argues that he would be prejudiced by the allowance of this motion, because he could have used other avenues in search of a remedy. This assertion is unsupported by any concrete examples, and such avenues are not immediately apparent to the court. O'Brien also contends that the costs he has incurred in pursuing this

litigation over the past nineteen months would have been avoided if the statute of limitations had been raised by Conrail at the outset. This assumes that Conrail would not have raised the preceding grounds of preemption and issue preclusion in support of its motion for summary judgment, and that is an assumption the Court cannot make.

Recent decisions have allowed defendants to raise an affirmtive defense in a motion for summary judgment "regardless of the failure to plead it in the answer." Buhl v. Biosearch Medical Products, Inc., 635 F.Supp. 956, 959 (D. Mont. 1985) (citing Rivera v. Anaya, 726 F.2d 564, 566 (9th Cir. 1984)); LaPorte v. R.D. Werner Co., Inc., 561

F.Supp. 189, 191 (N.D. Ill.) 1983) (relying on Baker v. Chicago Fire and Burglary Detection, Inc., 489 F.2d 953, 955 (7th Cir. 1973)); Mamos v. School Committee of the Town of Wakefiled, 553 F.Supp. 989, 992 (D. Mass. 1983) ("Defendants did not waive their statute of limitations defense by delaying its assertion").

In essence, the court must not put form over substance and should act in the spirit of Fed.R.Civ.P. 1 and seek a "just, speedy, and inexpensive determination of every action." A defendant should not be barred from asserting a valid legal defense to a claim without a showing of futility, intentional or inexcusable delay or prejudice to the plaintiff.

Therefore, Conrail's Motion to Amend Answer (Docket #31) should be ALLOWED. However, the court cannot find as a matter of law that O'Brien's claim is time barred under M.G.L. c.151B, §55.

CONCLUSION

The court recommends[6] that Conrails Motion for Summary Judgment (Docket #21SS) be ALLOWED on the grounds that O'Brien's state law

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[6]Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten days of receipt of the Report and Recommendation and must identify the portion of the Report and Recommendation to which objection is made and the basis for such objection. Any party may respond to another party's objections within ten days after service of the objections. Failure to file objections within the specified time waives the right to appeal the district court's order. United States v. Escoboza Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); United STates v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986).

claim of handicap discrimination (M.G.L. c. 151B, §4(16)) is preempted by the RLA and Section 503 of the Rehabilitation Act of 1973, and that the decisions of the NRAB and OFCCP should be given preclusive effect. Conrails Motion to Amend Answer (Docket #31) is also ALLOWED.

MARIANNE B. BOWLER
UNITED STATE MAGISTRATE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 88-2541-N

WILLIAM J. O'BRIEN, Plaintiff,	)
v.	)
CONSOLIDATED RAIL CORPORATION, Defendant.	)

DECEMBER 27, 1991

The report and recommendation is approved as to docket no. 215 for the reasons stated herein. Summary judgment shall enter for the defendant Conrail. While the Magistrate judge, in her typically thorough manner, has made a report and recommendation on

docket no. 311, no action need be taken thereon, as action on the motion for summary judgment moots the issue.

William Young
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 88-2541-N

WILLIAM J. O'BRIEN, Plaintiff,	)	
v.	)	C. A. No. 88-2541-N
CONSOLIDATED RAIL CORPORATION, Defendant.	)	

JUDGMENT

YOUNG, D.J. December 27, 1991

The motion for summary judgment having been allowed, judgment shall, and hereby does, enter for the defendant Consolidated Rail Corporation.

Kate Myrick, Deputy Clerk

Approved as to form:

WILLIAM J. YOUNG
UNITED STATES DISTRICT JUDGE

APPENDIX D

AGREEMENT

BETWEEN

CONSOLIDATED RAIL CORPORATION

AND

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLES, EXPRESS AND STATION EMPLOYES

CLERKS

EFFECTIVE JULY 1, 1979

[EXCERPTS]

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RULE 2 - APPOINTMENT TO PARTIALLY EXCEPTED POSITIONS

(a) All new partially excepted positions or vacancies in positions listed in Appendix No. 1 will be made known by means of a notice posted on all bulletin boards in the seniority district with the advice that interested employees should, in writing, within five (5) calendar days after the date of the notice advise the Company officer having jurisdiction over the position, with copy to the Division Chairman of the seniority district in which the vacancy occurs, his desire for consideration and state his qualifications.

Preferential consideration will be given to the above applicants prior to giving consideration to other employees covered by this Agreement or to employees not covered by this Agreement.

(b) When a partially excepted position is vacated by the incumbent for more than sixty (60) days and no notice has been posted under paragraph (a), or is abolished for more than sixty (60) days (except as provided in Rule 18(b) or (c)) it can only be reestablished by agreement between the Senior Director-Labor Relations and the General Chairman.

RULE 3 - CONSIDERATION FOR PROMOTION

Employees will be given consideration for promotion to Appendix 2 and Appendix 3 excepted positions as opportunity may offer.

RULE 4 - QUALIFICATIONS FOR BULLETINED POSITIONS OR VACANCIES

(a) Assignment and displacement rights to advertised positions or vacancies under these rules, shall be

based on seniority, fitness and ability. Fitness and ability being sufficient, seniority shall prevail

NOTE: The word "sufficient" is intended to more clearly establish the right of the senior employee to the position or vacancy where two (2) or more employees have adequate fitness and ability.

(b) Where the words "qualified employee" are used in this Agreement, they shall mean that an employee has sufficient fitness and ability as those terms are defined in paragraph (a) above.

(c) Employees required to take a written intelligence test as a prerequisite for employment shall not be required to take this particular test a second time, including persons

transferring from the scope of one agreement to another.

No intelligence or similar test shall be given nor used as a basis to determine the rights of the employee for promotion to positions covered by the Scope Rule of this Agreement.

RULE 5 - BULLETINING AND AWARDING OF POSITIONS

(a) All new positions and vacant positions known to be of more than thirt (3) days duration, will be bulletined in the seniority district on the Wednesday following the date they occur, but not later than the succeeding Wednesday for period of seven (7) calendar days in places accessible to employees affected. Bulletin will show position (indicating if new), location, primary duties, tour

of duty, assigned meal period, days of rest, rate of pay, symbol number and whether position is of permanent or temporary nature. A position which it is anticipated will be of six (6) months or more duration will be bulletined as a permanent position. Copies of bulletins and notices of award will be furnished the Division and Local Chairman. (Note: if the Wednesday is a holiday, the bulletin will be posted on the following day.)

Bulletins advertising seasonal positions in addition to stating that the position is of a permanent or temporary nature will also state if it is a seasonal position.

Temporary positions which become permanent, through any cause, shall be rebulletined. Temporary positions of six (6) months duration will be rebulletined as permanent.

Bulletined positions requiring stenographic duties will regularly perform such duties. If a bulletined stenographic position does not regularly perform stenographic duties such position shall be readvertised without stenographic duties.

(b) Employees, including those furloughed, desiring bulletined positions, will file their bids in writing, prior to the expiration of the bulletin, with the designated official with copy to the Local Chairman. All furloughed employees will be considered automatic bidders for permanent positions bulletined on their seniority district which do not require a change in residence, as defined in Section 501( ) of the Act. (Appendix No. 8).

An employee who desires to withdraw his application for a bulletined position must file his request, in writing, with the official whose name appears in the bulletin prior to the time and date on which the bulletin is closed.

(c) Bulletined positions will be awarded to the senior qualified bidder effective on the day following close of the advertising period. Notice of award will be posted where the position was bulletined on the following Wednesday, showing position, symbol number, date bulletined an the name of the employee awarded the position.

(d) Any employee, in service, awarded a bulletined position shall be transferred to such assignment within fourteen (14) calendar days after the effective date of the Award. If the employee is not transferred within the

specified time limit, he shall receive pay for an additional three (3) hours at the straight time rate of the position awarded for each work day that he is withheld from such assignment. (If withheld from an extra list assignment, he shall be paid at the extra list rate of pay).

(e) When a permanent position is awarded to a qualfied furloughed employee and it does not require a change in residence, he shall be recalled by certified mail to his home address. An employee failing to report for duty within ten (10) calendar days after such notice was mailed, except under circumstances beyond his control, shall forfeit all seniority.

(f) The provisions of the Agrement of May 12, 1978, (Appendix No. 13), will be continued in effect for transfer purposes under Title V of the Act.

(g) Positions of thirty (30) calendar days or less duration and vacation absences may be filled without bulletining. The senior qualified available employee requesting such position or requesting a bulletined position, pending assignment of a successful applicant, will be assigned, except where agreement requires the use of extra employees, provided this will not entail additional expense to the Company.

(h) Bulletined positions may be filled temporarily pending assignment.

(i) (1) Vacancies of more than five (5) days but less than thirty (30) calendar days' duration, and vacation absences of more than five (5) working days, will, if filled, be assigned on a hold-down basis to the senior qualified employee making written application for same. Hold-down on a vacant extra list position will not be permitted.

(2) A vacancy created by a regular employee assigned to a hold-down will not be subject to further hold-down and will be filled under the provisions of paragraph (d) of Rule 40 or paragraphs (f), (g) and (h) of Rule 24.

(3) An employee granted a hold-down must cover the position for the duration of the vacancy or absence and will assume the rest days of the position. An employee on a hold-down up to and including the work day preceding the rest days of the position, must observe the rest days.

(4) An employee on a hold-down who is displaced from his regular assigned position or whose regular assigned position is abolished, will not be required to exercise his seniority until after completion of the hold-down. Under these circumstances, observance

of the last rest days of the hold-down will not be applicable and the bumping period will commence the day following the last work day of the hold-down.

RULE 6 - BIDDING FOR MORE THAN ONE POSITION

When more than one position subject to the application of the provisions of Rule 5 exists at the same time, employees shall have the right to bid on any or all, stating preference. Nothing in this Agreement shall be construed to prevent employees bidding on all bulletined positions, irrespective of whether the position is of the same, greater or lesser remuneration.

RULE 7 - BIDDING ON FORMER POSITION

When an employee bids for and is awarded a bulletined position, his former position will be bulletined, if the former position is one which is subject to the provisions of Rule 5. Such employee can file a bid for the said former position and the same shall be considered, provided no other employee bids for it on the initial bidding.

RULE 8 - DECLINING PROMOTION OR TO BID

Employees declining promotion or declining to bid for a bulletined position, shall not lose their seniority except as otherwise provided in Rule 18.

RULE 9 - TIME IN WHICH TO QUALIFY

(a) Employees awarded bulletined positions or exercising displacement rights will be allowed thirty (30) days in which to qualify and failing to

qualify may exercise seniority under Rule 18(d). The thirty (30) days may be extended by agreement between the Local Chairman and the proper Company official.

(b) When it is evident that an employee will not qualify for a position, after conference with the Local Chairman, he may be removed from the position before the expiration of thirty (30) days and be permitted to exercise seniority under Rule 18(d). The Division Chairman will be notified in writing the reason for the disqualification.

(c) Employees will be given full cooperation of the department heads and others in their efforts to qualify.

RULE 10 - RETURNING FROM TEMPORARY POSITION

An employee assigned to a temporary position shall, upon expiration of same, or when displaced or disqualified, within seven (7) calendar days thereafter, return to his former position if available to him, or select any position bulletined during his absence which was awarded a junior employee. In the event he has no regular position, he shall exercise seniority under Rule 18(d).

RULE 11 - RETURNING FROM LEAVE OF ABSENCE, ETC.

An employee returning to duty after leave of absence, vacation, sickness, disability, jury duty or suspension shall either return to his former position if available to him, or shall select any position bulletined during his absence which was awarded to a junior employee.

***

RULE 49 - PHYSICAL FITNESS, DETERMINATION OF

When an employee has been removed from his position due to his physical condition and the employee or his representative desires the question of his physical fitness to be finally decided before he is permanently removed from his position, the case shall be handled in the following manner:

The General Chairman shall bring the case to the attention of the Senior Director-Labor Relations. The Company and the General Chairman shall each select a doctor to represent them, each notifying the other of the name and address of the doctor selected. These two (2) doctors will confer and appoint a third doctor. Such Board of Doctors shall then fix a time and place for the employee to meet them.

After completion of the examination, they shall make a full report in triplicate, one copy each to be sent to the Senior Director-Labor Relations, the Medical Director and the General Chairman.

The decision of the Board of Doctors, setting forth the employee's physical fitness and their conclusions as to whether he meets the requirements of the Company's physical examination policy, shall be final and binding on the parties, but this does not mean that a change in physical condition shall preclude a reexamination at a later time.

The doctors selected for such Board shall be experts in the disease or injury from which the employee is alleged to be suffering, and they shall be located at a convenient point so that it will only be necessary for the employee to travel a

minimum distance and, if possible, not to be away from home for a longer period than one (1) day.

The fees and expenses of the third or neutral physician shall be borne equally by the Company and the employee. All other expenses shall be paid by the Company and the employee incurring them, including the fees of the physician selected by them. At the time the Board's report is made, a bill for the fee, and traveling expenses, if any, of the third or neutral physician should be made in duplicate, one (1) copy to be sent to the Company's Medical Director and one (1) copy to the employee.

RULE 50 - INCAPACITATED EMPLOYEES

(a) Efforts will be made to furnish suitable employment to employees who have become physically incapacitated to

continue in service in their present occupation.

(b) By agreement, in writing, between the Division Chairman and the Manager Labor Relations, a disabled employee covered by the Scope of this Agreement, may be assigned to a new position or vacancy, or be placed in an existing position without regard to his seniority or the seniority of any other employee, provided he is capable of performing the service.

(c) A disabled employee while so assigned will not be permitted to bid for an advertised position.

(d) An employee displaced in the application of this Rule may exercise seniority in accordance with Rule 18.

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RULE 59 - NON-DISCRIMINATION

(a) The parties to this Agreement pledge to comply with Federal and State Laws dealing with non-discrimination toward any employee. This obligation to not discriminate in employment includes, but is not limited to placement, transfer, demotion, rates of pay or other forms of compensation, selection for training, lay-offs, and termination.

(b) Wherever words are used herein in the masculine gender, they shall be construed as though they were also used in the feminine gender in all cases where they would so apply.

RULE 60 - EXCEPTION TO RULE

(a) Exceptions to any rule or rules in this Agreement, in writing, between the Senior Director-Labor Relations and the General Chairman.

(b) Where provision is made in this Agreement for exceptions or special agreements between the Company and the duly accredited representatives of the employees, agreements with respect thereto will be in writing and numbered consecutively by seniority district, two (2) copies of each to be furnished the General Chairman and Senior Director-Labor Relations.

append-d

APPENDIX E

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1 Award No. 27989
Docket No. MS-28026
89-3-87-3-590

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (William J. O'Brien
(
(Consolidated Rail
(Corporation

STATEMENT OF CLAIM:

"This is to serve notice, as required by the rules of the National Railroad Adjustment Board of my intention to file an ex parte submission September 8, 1987 covering an unadjusted dispute between me and Conrail involving the question of discrimination in covering the position of stevedore in Framingham, Massachusetts."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee [sic] or employees [sic] involved in this dispute are respectively carrier and employees [sic] within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Considering the case at bar on merits, the on-property record indicates that Claimant requested to exercise his Agreement rights to displace onto a Stevedore position at the Auto Terminal

in Framington, Massachusetts effective August 27, 1985. His request was denied by Carrier's Supervisor due to physical disability (absent a hand since birth).

During the progression of this Claim on property the Carrier provided Claimant a test to determine his physical qualifications for the Stevedore position. A committee of six (6) determined that in the Carrier's words the Claimant "could not safely perform the various duties of the Stevedore assignment and therefore could not be considered qualified." The record specifically notes that Claimant was unable to safely climb ladders in inclement weather and handle forty pound bridge plates.

Claimant argued on property and before this Board that he had sufficient fitness and ability to perform the job. Further, with normal wrist action and a dedicated history of safely performing heavy and similar tasks, claimant was qualified. If Carrier had such concerns, some minimal accommodation or more proper and complete test should have been given. The Claimant argues that Carrier's actions were arbitrary, capricious, biased and defective.

The Board is concerned with this instant case, but as an appellate forum and not a court of equity, we must rule precedentially and upon the probative evidence.

By long established precedent this Board has found that "fitness and ability" determinations are vested with the Carrier (First Division Awards 20384, 17523; Second Division Award 6233; Third Division Awards 15387, 9534; Fourth Division Awards 4093, 3960). In the instant case, the test committee consisted of the Regional Medical Director, Safety Supervisor, District Claim Agent, Personnel Specialist, Health Services Manager and Supervisor. On the record, there is nothing that this Board can find to support Claimant's alleged Agreement violations. Once the Carrier finds insufficient qualifications, the burden of proof shifts to the Claimant to overcome that decision with substantial

probative evidence. Based upon the cold record, such evidence is absent. The Commission that evaluated the allegation on property found no Carrier defect. Absent proof of record to shoulder the burden of an unfair test or Carrier violation of Agreement provisions, we are constrained to deny the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: _____
Nancy J. Beuer - Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1989

append-e